Supreme Court, U.S.
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No. 01-116

In The

Supreme Court of the United States

EL PASO COUNTY WATER
IMPROVEMENT DISTRICT NO. 1,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

A. There Is No Conflict 2

B. The Fifth Circuit's Decision Was Also Correct 3

1. Application of the Factors Employed by This Court and Others Confirms that EPCWID is not an Arm of the State for Eleventh Amendment Purposes 3

2. EPCWID's "Stare Decisis" and "Bright-Line" Arguments Wither Under Scrutiny 6

a. This Court has Never Even Remotely Suggested that the Relevant Factors, Including the State Treasury Factor, Could be Ignored 7

b. EPCWID's Preference for the First Factor is Also Based on Erroneous Treatment of EPCWID's Status Under Texas Law 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Callahan v. City of Philadelphia, 207 F.3d 668 (3d Cir. 2000) 2

Cash v. Granville County Bd. of Educ., 242 F.3d 219 (4th Cir. 2001) 2

Clark v. Tarrant County, 798 F.2d 736 (5th Cir. 1986) 4

El Paso County Water Improvement Dist. No. 1 v. City of El Paso, 133 F. Supp. 894 (W.D. Tex. 1955), *modified*, 243 F.2d 927 (5th Cir. 1957) 9

Flores v. Cameron County, 92 F.3d 258 (5th Cir. 1996) 7

Hall v. Medical College of Ohio, 742 F.2d 299 (6th Cir. 1984) 2

Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994) 4, 7

Kashani v. Purdue Univ., 813 F.2d 843 (7th Cir. 1987) 3

Lake Country Estates, Inc. v. Tahoe Reg. Planning Agency, 440 U.S. 391 (1979) 4, 6

Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth., 991 F.2d 935 (1st Cir. 1993) 2

McGinty v. New York, 251 F.3d 84 (2d Cir. 2001) 2

Miccosukee Tribe v. Florida State Athletic Comm'n, 226 F.3d 1226 (11th Cir. 2000) 2

Monsanto Co. v. Cornerstones Mun. Util. Dist., 865 S.W.2d 937 (Tex. 1993) 6

Mt. Healthy City Sch. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) 4

TABLE OF AUTHORITIES – Continued

Page

Paul N. Howard Co. v. Puerto Rico Aqueduct & Sewer Auth., 744 F.2d 880 (1st Cir. 1984) 3

Regents of University of California v. Doe, 519 U.S. 425 (1997) 4, 7

Sears v. Colorado River Mun. Water Dist., 487 S.W.2d 810 (Tex. Civ. App. – Eastland 1972) 6, 8

Sherman v. Curators of Univ. of Mo., 16 F.3d 860 (8th Cir. 1994) 2

Streit v. County of Los Angeles, 236 F.3d 552 (9th Cir. 2001) 2

Sturdevant v. Paulsen, 218 F.3d 1160 (10th Cir. 2000) 2

Strykowski v. Northeast Ill. Reg. Commuter R.R., No. 93-2724, 1994 WL 287395 (7th Cir. June 28, 1994) 2

OTHER:

TEXAS WATER CODE ANN. § 49.066 (Vernon 2000) 5

TEXAS WATER CODE ANN. § 49.219 (Vernon 2000) 5

TEXAS WATER CODE ANN. § 51.185 (Vernon 2000) 5

TEXAS WATER CODE ANN. § 51.302 (Vernon 1972) 5

TEXAS WATER CODE ANN. § 51.320 (Vernon 1972) 5

TEXAS WATER CODE ANN. § 51.339 (Vernon 1972) 5

TEXAS WATER CODE ANN. § 51.448 (Vernon 1972) 5

TEXAS WATER CODE ANN. § 51.791 (Vernon 1972) 5

TEXAS WATER CODE ANN. § 51.803 (Vernon 1972) 5

TABLE OF AUTHORITIES – Continued

Page

TEXAS WATER CODE ANN. § 51.836 (Vernon & Supp. 2001) 5

TEXAS WATER CODE ANN. §§ 54.014-18 (Vernon 1972) 5

STATEMENT OF THE CASE

This case arises in connection with a recent El Paso County Water Improvement District No. 1 (EPCWID) initiative whereby it claims the right to demand payment for crossing over ditches it maintains in and around El Paso, Texas from users of public roads and ways. It claims to be immune to the various state and federal laws that give telecommunications companies and others the right to use the public ways without making payment to the state or local governmental entities because, according to EPCWID, it is a private property owner whose interests are not subject to or controlled by Texas law. Despite its own position in this case, EPCWID also claims that it is an alter ego of the State. Indeed, notwithstanding its claimed identity with the State, EPCWID has informed the Texas Attorney General in connection with this case that it intends to argue that the Texas law protecting telephone utilities from local abuses of the sort attempted here is unconstitutional.[1]

The District Court and the Fifth Circuit, applying this Court's well-established Eleventh Amendment standards, found that EPCWID was not an arm of the State of Texas. This conclusion was indisputably correct under decisions of this Court and others treating several factors, including the entity's financial dependence on the state, as controlling. The Petition does not offer any basis for error or any suggestion of conflict. In fact, the theory advanced by the Petition – favoring a new single-factor test – is at

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[1] EPCWID filed a copy of this letter with the district court below.

odds with every decision of this Court on the subject and relies on the demonstrably erroneous assumption that Texas regards EPCWID as its alter ego. The Petition should be denied.

REASONS FOR DENYING THE WRIT

A. There Is No Conflict

Notably, the Petition makes no attempt to even suggest that the Fifth Circuit's decision creates a conflict among the circuits. In fact, the Fifth Circuit's decision – requiring application of the six factors identified by this Court and others as controlling the arm-of-the-state inquiry – is in accord with decisions of every other circuit and, of course, decisions of this Court.[2] Likewise, the Fifth Circuit's decision denying arm-of-the-state status to

[2] In fact, notwithstanding EPCWID's argument in favor of a single factor test, every circuit with jurisdiction over the states has developed a multi-factor test similar to the Fifth Circuit's: *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 991 F.2d 935, 939 (1st Cir. 1993); *McGinty v. New York*, 251 F.3d 84, 95 (2d Cir. 2001); *Callahan v. City of Philadelphia*, 207 F.3d 668 (3d Cir. 2000); *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 224 (4th Cir. 2001); *Hall v. Medical College of Ohio*, 742 F.2d 299, 302 (6th Cir. 1984); *Strykowski v. Northeast Ill. Reg. Commuter R.R.*, No. 93-2724, 1994 WL 287395 (7th Cir. June 28, 1994); *Sherman v. Curators of Univ. of Mo.*, 16 F.3d 860, 865 n.6 (8th Cir. 1994); *Streit v. County of Los Angeles*, 236 F.3d 552, 566 (9th Cir. 2001); *Sturdevant v. Paulsen*, 218 F.3d 1160 (10th Cir. 2000); *Miccosukee Tribe v. Florida State Athletic Comm'n*, 226 F.3d 1226, 1231 (11th Cir. 2000).

a local water authority is in harmony with the only other circuit authority on the subject.[3]

While the Petition correctly notes that there was once disagreement *within* the Fifth Circuit about whether the factors could be jettisoned in favor of a so-called "bright-line" test that had been employed in an unpublished district court decision involving EPCWID, the panel in this case, consistent with practice in every other circuit, adhered to earlier precedent requiring consideration of all of the relevant factors and rejected this so-called "bright-line" test.

Obviously, this Court does not sit to resolve conflicts internal to a single circuit. This is the function of the *en banc* sitting of the circuits. The Fifth Circuit *en banc* considered EPCWID's arguments for creating a "bright-line" test and rejected them, leaving that circuit in harmony with every other circuit.

B. The Fifth Circuit's Decision Was Also Correct

1. Application of the Factors Employed by This Court and Others Confirms that EPCWID is not an Arm Of The State for Eleventh Amendment Purposes

No one disputes that some entities created by the state are so closely identified with it as to be regarded as

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[3] *Paul N. Howard Co. v. Puerto Rico Aqueduct & Sewer Auth.*, 744 F.2d 880, 886 (1st Cir. 1984) (rejecting arm of state status to water authority); *see also, e.g., Kashani v. Purdue Univ.*, 813 F.2d 843 (7th Cir. 1987) (stressing that political subdivisions are not regarded as the state).

the state's alter ego. That said, this "Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions, such as counties and municipalities, even though such entities exercise a slice of state power." *Lake Country Estates, Inc. v. Tahoe Reg. Planning Agency*, 440 U.S. 391, 401 (1979). The question, then, is whether the entity "is more like a county or a city than it is like an arm of the state." *Mt. Health City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977). Judged against this standard, EPCWID is obviously not an arm of the state.

The Fifth Circuit, following this Court's guidance, established a six-factor test for determining whether an entity is an arm of the state for purposes of the Eleventh Amendment. *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986). These six factors inquire into: (1) whether the state statutes and case law view the agency as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. *Id.* at 744-45. This Court's recent decision in *Regents of University of California v. Doe*, 519 U.S. 425, 430-31 (1997), confirmed that the vulnerability of the state's purse is the most salient of these factors. This makes considerable sense in view of the Court's repeated recognition that the states' financial liability is "the Eleventh Amendment's core concern." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 53 (1994).

EPCWID has virtually no financial dependence on the state. It was undisputed below that EPCWID's funding is derived locally in the form of user fees, local taxes and bonds. TEX. WATER CODE ANN. §§ 51.302, 51.320, 51.339 and 51.448 (Vernon 1972). When a water improvement district dissolves, any remaining indebtedness is paid off by issuing more local bonds, which are to be retired by local taxes. *Id.* at § 51.803. If there is a surplus, the funds are paid *to the county treasurer*, not to the State. *Id.* at § 51.791. Likewise, if there is a deficiency after dissolution, the county is responsible for collecting the balance through another local tax. *Id.* at § 51.836. Indeed, during its deposition,[4] EPCWID conceded that it has never received funding from the state government, depo. trans. at 148, 214-15, and claimed to operate free from Texas governmental control. *Id.* at 19 ("we don't serve public needs").

As the Fifth Circuit noted in its opinion below, EPCWID made no effort to show its entitlement to immunity under the remaining five factors. The reason was clear: EPCWID was created as an indisputably autonomous local entity[5] that has the right to sue and be sued[6] and to hold property in its own name.[7]

In fact, while EPCWID would discard all of the other factors in favor of the first – whether state statutes and

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[4] The deposition transcript may be found as exhibit 14 to Southwestern Bell's Motion for Summary Judgment filed on April 14, 2000.

[5] TEXAS WATER CODE ANN. §§ 54.014-18 (Vernon 1972).

[6] *Id.* §§ 49.066; 51.185 (Vernon 2000).

[7] *Id.* § 49.219 (Vernon 2000).

case law treat it as an arm of the state – it plainly fails under that factor as well. Texas state courts treat water improvement districts as "political subdivision(s) of the state standing on the same footing as a county." *Sears v. Colorado River Mun. Water Dist.*, 487 S.W.2d 810, 812 (Tex. Civ. App. – Eastland 1972); *see also Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937 (Tex. 1993) (finding political subdivisions lacking statewide jurisdiction not to amount to the "state"). EPCWID would thus plainly fail the test set forth by this Court in the *Mt. Healthy* decision and elsewhere. *E.g., Lake County Estates*, 440 U.S. at 401.

2. EPCWID's "Stare Decisis" and "Bright-Line" Arguments Wither Under Scrutiny

EPCWID makes two related arguments against the panel decision in this case and in favor of its claimed status under state law. First, EPCWID complains that the Fifth Circuit rejected an earlier, one paragraph summary affirmance of an order approving immunity under a supposed "bright-line test." Second, EPCWID urges that the Fifth Circuit erred in not adopting the "bright-line test" it sponsored. In particular, EPCWID argues that this Court should now adopt a rule that would treat any political subdivision created under the Texas Constitution (or at least Article XVI, section 59) as an arm of the state, regardless of the entity's actual relationship to the state. Both of EPCWID's arguments are built on error – now corrected – that was wholly internal to the Fifth Circuit.

a. This Court has Never Even Remotely Suggested that the Relevant Factors, Including the State Treasury Factor, Could be Ignored

First, this Court and the lower federal courts, including the Fifth Circuit, have all identified a number of factors governing the arm-of-the-state analysis. The Fifth Circuit did not err in applying the relevant factors. The Fifth Circuit has long held that the six-factor test cannot be by-passed in favor of comparison between supposedly like entities. *E.g., Flores v. Cameron County,* 92 F.3d 258, 268 (5th Cir. 1996). Thus, the panel decision here adhered to the established rule.

But EPCWID's argument for a one-factor test is not only inconsistent with Fifth Circuit authority, it also is at odds with decisions of this Court. In recent decisions, this Court has made clear that the so-called "state treasury" factor, which inquires into the financial dependence of the entity on the state, is the most important of the factors that must be considered. *Regents of University of Cal. v. Doe,* 519 U.S. 425, 430-31 (1997) (citing *Hess v. Port Auth.,* 513 U.S. 30, 48 (1994) (suggesting that controlling significance is given to the so-called state treasury factor)). EPCWID's argument for a "bright-line" test eschewing all factors except the entity's status in the eyes of the state (a test it would fail anyway, infra), would totally erase the state treasury factor (and all others) and allow a state simply to confer Eleventh Amendment immunity on any autonomous local governmental entity by declaration, even though the entity has no financial or political relationship to the state.

b. EPCWID's Preference for the First Factor is Also Based on Erroneous Treatment of EPCWID's Status Under Texas Law

In any event, a "bright-line" test would not only be inconsistent with the core purpose of the Eleventh Amendment and all of the relevant law on the subject, it would also not benefit EPCWID in this case. Texas, as noted above, does not regard EPCWID as an arm of the state. *E.g.*, *Sears*, 487 S.W.2d at 812.

EPCWID's argument to the contrary is drawn entirely from (1) an unpublished decision of a district court, later affirmed in a per curiam decision that the Fifth Circuit has already found to be in error, and (2) dicta in a still earlier district court decision that did not involve the Eleventh Amendment question at all.

EPCWID first relies on an unpublished district court decision applying a "bright-line" rule under which it was concluded EPCWID would be an arm of the state. That decision, as the Fifth Circuit noted in its decision in this case, traces back to cases involving Texas Port Authorities and the question whether they are state entities entitled to common-law sovereign immunity. When one panel of the Fifth Circuit found a Texas Port Authority to be immune, another panel later found itself bound by that holding, noting that both Ports existed under the same Texas Constitutional provision, Article XVI, section 59. From this, the district court divined a "bright-line" test that would treat any of the thousands of Texas political subdivisions created under that section as automatically immune under the Eleventh Amendment, regardless of

their connection to the state.[8] While that district court decision was affirmed per curiam by a panel of the Fifth Circuit, it was contrary to earlier Fifth Circuit precedent, decisions of this Court and common sense. It was therefore properly rejected by the Fifth Circuit in this case below. And, the Fifth Circuit therefore properly refused to rehear the matter *en banc*.

EPCWID also relies on *part* of a 1955 federal district court decision suggesting that it is a "political subdivision" and "arm" of the state. *El Paso County Water Improvement Dist. No. 1. v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *modified*, 243 F.2d 927 (5th Cir. 1957). What EPCWID does not note is that this case did not raise or involve the Eleventh Amendment question at all. The district court there was addressing the entirely different question of title to a canal in the City of El Paso. Moreover, while EPCWID quotes this district court opinion at length, and highlights part of the case, it does not highlight the portion of the same discussion noting that EPCWID *"stand[s] upon the same footing as counties and other political subdivisions." Id.* (emphasis added).

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[8] As the Fifth Circuit noted in this case, the fact that an entity is a creature of the state or that it is entitled to sovereign immunity does not answer the question whether it is an alter ego of the state under the Eleventh Amendment. If it did, cities and counties, which are both creatures of the state (and often of state constitutions), would automatically be entitled to immunity as well.

CONCLUSION

When the appropriate standard is applied, it is clear that the district court and the Fifth Circuit were both correct in concluding that EPCWID is not entitled to immunity under the Eleventh Amendment. The Petition presents neither conflict nor any error. It should therefore be denied.

Respectfully submitted,

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